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No. 82-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SKIPPY, INC., *Petitioner,*

v.

CPC INTERNATIONAL, INC., *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S REPLY BRIEF

A. RAYMOND RANDOLPH, JR.
CAROL L. CHOMSKY
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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PETITIONER'S REPLY BRIEF

Respondent CPC International, Inc. ("CPC") has not argued, as indeed it could not, that the issues raised in our Petition are unimportant or unworthy of this Court's attention. Trial by jury is a fundamental right under the Constitution and any denial of that right seriously undermines our system of justice.[1] Respondent has contended, instead, that there was no denial of a right to jury trial because the court of appeals was correct in holding that the petitioner failed to assert its rights adequately in the trial court and that consequently only non-jury issues remained at the time of trial. We have explained in our Petition why the court of appeals erred in reaching this

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[1] See *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937); *Simler* v. *Conner*, 372 U.S. 221, 222 (1963).

conclusion, and we will not repeat those arguments here. We believe it necessary, however, to correct CPC's inaccurate account of the proceedings and pleadings in the district court and its misstatement of our arguments before this Court.

1. In our Petition, we argued that the granting of CPC's partial summary judgment motion on the ground of laches improperly denied Skippy, Inc. ("Skippy") a jury determination on its claim for damages because the question whether CPC committed fraud was relevant to that finding of laches and should have been reserved for the jury.[2] CPC has countered by stating that there were no disputed issues of fact regarding the delay on which the court based its finding of laches and consequently summary judgment was appropriate.[3] It is true, of course, that summary judgment is appropriate when there are no disputed issues of fact; our point, which CPC ignores, is that there *was* a disputed issue of fact—fraud—and the trial court erred when it ignored this in reaching the issue of laches.

CPC further argues that fraud, when raised in avoidance of an affirmative defense to an equitable claim, is itself an equitable issue for the court, not for the jury.[4] Once again, CPC has stated the law correctly, but misapplied it to the proceedings here. Petitioner raised fraud not only in response to CPC's defense of release, but also as part of its own claim for damages, and it is this, not

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[2] Petition, at pp. 21-24.

[3] Brief in Opp., at p. 7.

[4] Brief in Opp., at p. 8.

simply that "fraud was an issue in this case,"[5] which gave Skippy the right to a jury trial.

CPC's denial that petitioner had any right to a jury trial reduces ultimately to CPC's argument that the availability of damages for fraud was never raised in the trial court.[6] If the issue had not been raised, then CPC would be correct in contending that no factual disputes existed regarding laches and that fraud was alleged only in connection with equitable claims.

But the issue *was* raised in Skippy's opposition to CPC's first motion for summary judgment.[7] Skippy clearly argued that the existence of fraud in obtaining the release would affect the availability of damages for infringement,[8] and this made it an issue of fact related to a legal claim and thus to be decided by a jury.

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[5] Brief in Opp., at p. 8.

[6] Brief in Opp., at pp. 8-9.

[7] Because the question whether the issue was raised before the trial court is critical, and because CPC has categorically denied that any mention of it was made below, we have included in an appendix to this Brief an excerpt of the portions of Skippy's opposition to summary judgment that contain this argument. We note that the issue was not raised in Skippy's Proposed Findings of Fact and Conclusions of Law, see Brief in Opp. at p. 9 & n.17, because Judge Bryan had already removed it from the case by erroneously granting summary judgment on all damage claims.

[8] See the excerpt contained in the Appendix, *infra*. Skippy did not make this a separate claim for damages for fraud in procurement of the release, but did clearly raise the issue of fraud in relation to the legal issue of trademark damages. Moreover, "it is . . . clear from [*Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962)] that ambiguities and inelegancies in a pleading will not defeat a demand for a jury trial so long as it reasonably appears that the substance of what is pleaded constitutes a claim for relief at law." *Robine* v. *Ryan*, 310 F.2d 797, 798 (2d Cir. 1962).

2. CPC has stated that its own legal counterclaim for damages could not provide a basis for petitioner's right to a jury trial because the counterclaim was "abandoned at the outset of trial."[9] CPC cannot unilaterally abandon a claim on the eve of trial, however. In order to dismiss the counterclaim, CPC was required by Federal Rule of Civil Procedure 41 to obtain either a signed stipulation from petitioner or a court order. CPC did neither and gave no notice of any intent to "abandon" the claim.

Indeed, CPC took quite a different position in the court of appeals. In its brief on the merits it stated that "CPC's damage claim has been decided adversely to CPC" by the trial court.[10] In its response to Skippy's Petition for Rehearing, CPC chastised Skippy for failing affirmatively to argue its right to jury trial on the counterclaim, because "CPC might have conceded the question and a jury would have been impanelled" or "CPC might have abandoned its counterclaim" but instead "the counterclaim was dismissed at the close of all the evidence."[11] CPC has thus variously argued that it abandoned the counterclaim, that the counterclaim was dismissed after presentation of all the evidence, and that the trial court decided it. In fact, as is clear from reading the district court opinion, the issue remained in the case until the end and was decided by the trial court. Moreover, even if CPC were correct in contending that no evidence was presented and that a directed verdict would thus have been available to take the issue from the jury, a directed ver-

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[9] Brief in Opp., at 10.

[10] Brief of Appellee, at p. 38.

[11] Response to Petition for Rehearing and Suggestion for Review En Banc, at pp. 12-13.

dict could have been granted only if Skippy moved for one, which it would not have done if it wished to exercise its right to have the jury determine the question of fraud.

3. Finally, CPC argues that while there may be a split among the courts of appeals on the standards for waiving right to jury trial, this case does not raise the issue. While the decision of the court of appeals in this case may not have used the precise terminology of waiver, it determined that, despite the filing of a timely jury demand, Skippy's alleged failure to raise particular arguments in the trial court[12] resulted in an inability to raise the issue of jury trial on appeal, which is a finding that Skippy waived any objection to trial to the court. This holding, regardless of how it was worded, places the Fourth Circuit squarely in the center of the conflict.

CONCLUSION.

For the foregoing reasons and the reasons set forth in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

A. RAYMOND RANDOLPH, JR.
CAROL L. CHOMSKY
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400
Counsel for Petitioner

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[12] As we explained, *supra*, at p. 3, these arguments were raised in the trial court.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 80-250-A

SKIPPY, INC.

Plaintiff,

v.

CPC INTERNATIONAL, INC.

Defendant.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

[3] Although laches is not a sufficient defense for a willful infringer against a claim for an injunction, laches may be permitted to limit the *amount* of the infringer's damages. Whether damages are limited to the date following the filing of the suit or the period permitted by the statute of limitations is determined by the equities in each case. *Layton Pure Food Co.* v. *Church & Dwight, Co.*, 182 F. 35, 40-41 (8th Cir. 1910); *cf. Dwinell-Wright Co.* v. *White House Milk Co.*, 132 F.2d 822, 824 (2d Cir. 1943). In any event, damages are permitted against a willful infringer, where, as here, defendant has otherwise practiced fraud upon the plaintiff. *Baker* v. *Simmons Co.*, 307 F.2d 458 (1st Cir. 1962).

* * *

[4] As we show more fully below, defendant's Motion for dismissal of plaintiff's trademark claim for injunctive relief on the grounds of laches and estoppel should be denied because there exist many genuine issues of material fact, including Rosefield's bad faith adoption and use, the absence of plaintiff's affirmative act of consent and defendant's reliance on such consent. Similarly, defendant's Motion with respect to plaintiff's claim for damages on its trademark infringement should be denied on two grounds. First, whether the damages should be limited to the period permitted by the statute of limitations or the date subsequent to the filing of the Complaint depends upon facts which are in dispute and second because there exists a genuine issue of fact as to defendant's unclean hands on matters unrelated to its trademark infringement.

* * *

C. Damages

* * *

[26] Moreover, as previously noted, there is another basis for permitting damages for plaintiff's trademark claim prior to the date when the complaint was filed. Following plaintiff's threat to sue the defendant in early 1977, defendant led plaintiff to believe that an advertising concept had been given the go-ahead which meant real possibilities of future royalties to plaintiff, when in fact, the advertising concept had already been rejected. Defendant's actions calculated to induce plaintiff to execute the Option Agreement which included a release constituted fraud and deceit. *Hester* v. *New Amsterdam Casualty, Co.*, 412 F.2d 505 (4th Cir. 1969); *Thermoid*

Rubber Co. v. *Bank of Greenwood*, 1 F.2d 891 (4th Cir. 1924).

Faced with similar fraudulent motives and actions, the court in *Baker* v. *Simmons Co.*, *supra*, denied defendant's right to assert the equitable defense of laches against a trademark infringement claim for damages. Accordingly, defendant's Motion to dismiss plaintiff's trademark claims for damages should be denied, for there are genuine issues of material fact as to the equities of defendant's willful infringement and as to defendant's unclean hands. *Charbonage De France* v. *Smith*, *supra*.